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UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
CALIFORNIA

11 CHAD MCKINNEY, an individual,
12 Plaintiff,

13 | v.

14 APOLLO GROUP, INC.,
15 UNIVERSITY OF PHOENIX, a
16 Corporation, MECHELLE
17 BONILLA, an Enrollment Manager
18 at UNIVERSITY OF PHOENIX,
19 KYAN FLYNN, Director of
20 Enrollment at UNIVERSITY OF
PHOENIX, APRIL ALCORN, an
Employees Relations Consultant at
UNIVERSITY OF PHOENIX,
CARLYN LINDSTEN, Associate
Director of Enrollment at
UNIVERSITY OF PHOENIX

21 Defendants

CASE NO. 07-CV-2373 WQH CAB

**KYAN FLYNN, MECHELLE
BONILLA AND CARLYN
LINDSTEN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
CLERK'S ENTRY OF DEFAULT**

[FRCP 55(c)]

**NO ORAL ARGUMENT, UNLESS
REQUESTED BY THE COURT**

Date: April 7, 2008

Time: 11:00 a.m.

Courtroom: 4

Judge: Hon. William Q. Hayes

DATE OF FILING: December 19, 2007

I.

INTRODUCTION

27 Apollo Group, Inc., (erroneously sued as Apollo Group, Inc., University of

1 Phoenix, a Corporation), (hereafter, "Apollo"), and Kyan Flynn, Mechelle Bonilla
 2 and Carlyn Lindsten (herein after, the "Individual Defendants")¹ oppose plaintiff
 3 Chad McKinney's ("McKinney") motion for entry of default and seek to set them
 4 aside for good cause shown pursuant to Federal Rules of Civil Procedure ("FRCP")
 5 55(c). An entry of default was made against Apollo and motions to set aside the
 6 entry of default and to dismiss have already been filed.² Subsequently, McKinney
 7 has submitted proofs of return of service and an entry of default has been entered by
 8 the Court Clerk regarding the Individual Defendants. McKinney's improper
 9 attempts at service and failure to state a claim argued in Apollo's motions are
 10 equally applicable to the Individual Defendants. The entries of default were sought
 11 in bad faith by McKinney, because neither Apollo nor the Individual Defendants
 12 were ever given proper service of the above-captioned action as required by FRCP
 13 Rules 4(e) and (h).

14 McKinney failed to properly serve the Individual Defendants in accordance
 15 with FRCP Rule 4 because he did not properly serve them via personal service,
 16 substitute service, mail service or service by publication. Although some
 17 procedural rules may be relaxed for *pro se* litigants, all plaintiffs must follow the
 18 rules for service of the complaint. *See Graham v. United States*, 79 Fed. Appx.
 19 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir. June 2, 2003). This
 20 procedural step is important not only to ensure due process, but also for
 21 jurisdictional reasons, because absent proper service, a court lacks jurisdiction over
 22 the defendant. Moreover, the content of the summons issued by McKinney does
 23 not meet the general requirements of a summons as delineated by Rule 4(a) since
 24 the summons was not directed to any particular individual or entity.

25 Accordingly, the Individual Defendants oppose McKinney's motion and

26 ¹ As of the date of filing this motion, no proof of return of service nor an entry of default has been
 27 filed concerning individually named defendant April Alcorn.

28 ² Apollo filed these motions on March 7, 2008, and they are set to be heard on April 7, 2008, at
 11:00 a.m. In the interest of judicial economy Apollo and the Individual Defendants request that
 these and plaintiff's motions be consolidated.

1 request that the Court set aside the Court Clerk's entry of default and allow the
 2 Individual Defendants to provide their responsive motion to this action.

3
 4 **II.**

5 **STATEMENT OF FACTS / PROCEDURAL HISTORY**

6 McKinney filed this complaint on December 19, 2007. [McKinney's
 7 complaint for damages ("Complaint"), pg 1.] McKinney, however, did not obtain a
 8 summons issued by the Court until approximately one month later on January 15,
 9 2008. [Declaration of Nathan W. Hicks ("Hicks Decl."), ¶ 2, Ex. A.] According to
 10 McKinney's proofs of return of service, he attempted to serve the Individual
 11 Defendants under California law through substitute service at their place of work.
 12 [Hicks Decl. ¶ 2, Exs. B, C and D.]

13 McKinney's return of service papers regarding Ms. Flynn and Ms. Lindsten
 14 filed with the Court on March 12, 2008, state that a process server attempted to
 15 serve them "by leaving copies with Ellen Bowens (Administration)" on January 31,
 16 2008. [Id., Exs. B and C.] Neither Ms. Flynn or Ms. Lindsten were personally
 17 served with any legal documents by McKinney, and neither were aware of any
 18 attempts of personal service of legal documents in this matter. [Declarations of
 19 Kyan Flynn and Carlyn Lindsten, ¶ 2.] In fact, neither Ms. Flynn nor Ms. Lindsten
 20 were aware that they were defendants in this matter until they received McKinney's
 21 request for an entry of default against them on March 13, 2008.³ [Id.] Moreover,
 22 neither Ms. Flynn or Ms. Lindsten work with Ellen Bowens or are even in her
 23 department. [Id., ¶ 3.]

24 McKinney's return of service papers regarding Ms. Bonilla filed with the
 25 Court on March 12, 2008, state that a process server attempted to serve her "by
 26 leaving copies with Virginia Torres at defendant's place of employment." [Hicks

27
 28 ³ This is very likely since none of the subpoenas were directed to any particular entity or
 individual as is required by FRCP Rule 4(a).

1 Decl., ¶ 2, Ex. D.] In the same fashion, however, Ms. Bonilla was never personally
 2 served with any legal documents by McKinney, and was never made aware of any
 3 attempts at personal service of any legal documents upon her either. [Declaration
 4 of Mechelle Bonilla, ¶ 2.] Additionally, she, too, did not know that she was a
 5 named defendant in this matter until she received McKinney's notice of default in
 6 the mail on March 13, 2008.⁴ [Id, ¶ 3.]

7 Based on McKinney's assertions that the Individual Defendants were given
 8 sufficient service of process on January 31, and February 4, 2008, the Court Clerk
 9 made an entry of default on March 12, 2008. [Hicks Decl., ¶ 2 Ex. E.] This motion
 10 is made following a reasonable and good faith attempt to conference with
 11 McKinney on February 29, 2008. [Id., ¶ 3.] However, after counsel explained
 12 McKinney's improper service attempts, not only did McKinney still refuse to
 13 cooperate, he filed the foregoing additional improper motions for entry of default
 14 two weeks later. [Id.]

15
 16 **III.**

17 **THE INDIVIDUAL DEFENDANTS WERE NEVER GIVEN**
 18 **SUFFICIENT SERVICE OF PROCESS.**

19 FRCP Rule 4(e) provides in pertinent part:

20 Unless otherwise provided by federal law, service upon
 21 an individual from whom a waiver has not been obtained
 22 and filed, [...] may be effected in any judicial district of
 23 the United States:

24 (1) pursuant to the law of the state in which the district
 25 court is located [...]; or
 26 (2) by delivering a copy of the summons and of the
 27 complaint to the individual or by leaving copies thereof at
 28 the individual's dwelling house or usual place of abode
 with some person of suitable age and discretion then

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1 residing therein or by delivering a copy of the summons
 2 and complaint to an agent authorized by appointment or
 3 by law to receive service of process.

4 FRCP Rule 4(e); *LSJ Investment Co., Inc. v. O.L.D., Inc.* 167 F.3d 320, 322-323
 5 (6th Cir. 1999). To that end, California state law allows for service upon an
 6 individual by delivering a copy of the summons and complaint:

7 Via personal delivery or an authorized agent for service of
 8 process;

9 [or]

10 Substitute service coupled with mailing after a good faith
 11 effort at personal service has been attempted;

12 [or]

13 Mail service, coupled with acknowledgement of receipt;

14 [or]

15 Service by publication.

16 Cal. Code Civ. Proc. §§ 415.10, 415.20, 415.30, 415.50.

17 Thus, under both federal and state law, service of summons upon an
 18 individual is only proper if made by personal service to the individual or their
 19 authorized agent to accept service of process or by substitute service at the
 20 individual's "dwelling house or usual place of abode." *See id.*; FRCP Rule 4(e)(2).
 21 California, however, allows substitute service to be effected at the individual's
 22 residence *or* place of employment as long as a good faith attempt at personal
 23 service was made and the substitute service is coupled with a mailing of a copy of
 24 the summons and complaint to the defendant. Cal. Code Civ. Proc. § 415.20.
 25 When a defendant challenges service of process, a plaintiff bears the burden of
 26 showing that service is valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 800
 27 (9th Cir. 2004); *Belle, supra, citing Hirsh v. Blue Cross, Blue Shield*, 800 F.2d
 28 1474, 1477 (9th Cir. 1986). Moreover, if a plaintiff fails to serve a defendant in
 accordance with Rule 4, the court lacks jurisdiction over that defendant. *Jackson v.
 Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

1 **A. McKinney Did Not Make Any Good Faith Attempts at Personal Service**
 2 **and Did Not Mail A Copy of the Summons and Complaint to Any of the**
 3 **Individual Defendants.**

4 According to McKinney's proofs of return service, he attempted to serve the
 5 Individual Defendants under California law through substitute service at their place
 6 of work. [Hicks Decl., ¶ 2, Exs. B, C and D.] McKinney failed to comply with the
 7 requirements of California law, and therefore FRCP Rule 4(e), because he did not
 8 demonstrate that he made a good faith attempt at personal service nor that he
 9 provided mail copies of the summons and complaint to the Individual Defendants
 10 via pre-paid first class mail. Cal. Code Civ. Proc. § 415.20(b). [Declarations of
 11 Kyan Flynn, Mechelle Bonilla, and Carlyn Linsten In Support of Motion to Dismiss
 12 Plaintiff's Complaint.]

13 If the defendant challenges the method of service, the burden is on plaintiff to
 14 show that reasonable attempts were made to serve defendant personally before
 15 resorting to substitute service and why personal service could not be effected.
 16 *Evartt v. Superior Court*, 89 Cal. App. 3d 795, 801 (1979). Two or three attempts
 17 to personally serve defendant at a "proper place" ordinarily qualifies as "reasonable
 18 diligence" at attempting personal service. *Espindola v. Nunez*, 199 Cal. App. 3d
 19 1389, 1392 (1988); *Stafford v. Mach*, 64 Cal. App. 4th 1174, 1182 (1998).
 20 Furthermore, McKinney did not even bother to mail a copy of the summons and
 21 Complaint to the Individual Defendants as is required under California law. Cal.
 22 Code Civ. Proc. § 415.20(b); *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal. App.
 23 3d 1009, 1015 (1990).

24 Indeed, McKinney failed to even direct the summons and Complaint to any
 25 individual at all as required by FRCP Rule 4(a). Instead, McKinney simply
 26 dropped off an envelope to UOP employees, Ellen Bowens and Virginia Torres,

1 without regard to their connection with the Individual Defendants,⁵ and expected
 2 this to constitute sufficient service of process. This is unacceptable under
 3 California law and the Federal Rules.

4 While procedural rules may be relaxed for *pro se* litigants, even a *pro se*
 5 plaintiff must comply with the rules for service of process. *See Graham v. United*
 6 *States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir.
 7 June 2, 2003) *citing Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992)
 8 (abrogated on other grounds by *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043,
 9 1045 (9th Cir. 2002)).

10 Accordingly, since McKinney did not properly serve any of the Individual
 11 Defendants, the Clerk's entry of defaults should be set aside.

12

13 **IV.**

14 **THE INDIVIDUAL DEFENDANTS DID NOT REASONABLY BELIEVE**
 15 **THEY HAD BEEN GIVEN SUFFICIENT SERVICE OF PROCESS.**

16 Given that: (1) the summons was not properly directed to any entity or
 17 individual; (2) McKinney did not make any reasonable attempts at personal service;
 18 (3) McKinney did not mail a copy of the summons and Complaint to the Individual
 19 Defendants; and (4) neither of the Individual Defendants were made aware of their
 20 involvement in this action until McKinney mailed them a notice of default on
 21 March 13, 2008, there was no reason to believe that the Individual Defendants had
 22 been given sufficient service of process by McKinney in this matter. Accordingly,
 23 if it is found that McKinney's service upon the Individual Defendants was
 24 sufficient, they reasonably believed, but were mistaken, that they had not been

25

26 ⁵ It is also McKinney's burden to demonstrate that there was a "close connection" between the
 27 person being served and the person receiving substitute service on their behalf. *See* Judicial
 28 Counsel Comment to Cal. Code Civ. Proc. § 415.20. In fact, Ms. Bowens does not even work in
 the same department as Ms. Flynn or Ms. Lindsten, and not even in the same city as Ms. Flynn.
 [Flynn and Lindsten Decl., ¶ 3.]

1 given actual notice and properly service so that they should be relieved from the
2 Clerk's entry of default.

3
4 V.

5 **CONCLUSION**

6 For the reasons stated above, the Individual Defendants respectfully request
7 the Court to deny McKinney's motions for entry of default for good cause shown.

8
9 Date: March 14, 2008

10 SNELL & WILMER L.L.P.

11 By: 
12 Christy Joseph
13 Nathan W. Hicks
14 Attorneys for Apollo Group, Inc.

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1 **PROOF OF SERVICE**2 *USDC – Southern District, Case No. 07-CV-2373 WQH CAB*3 I am employed in the County of Orange, State of California. I am over the age of
4 18 and not a party to the within action; my business address is 600 Anton Boulevard,
5 Suite 1400, Costa Mesa, California 92626.6 On March 14, 2008, I served, in the manner indicated below, the foregoing
7 document described as **KYAN FLYNN, MECHELLE BONILLA AND CARLYN
LINDSTEN'S OPPOSITION TO PLAINTIFF'S MOTION FOR PLAINTIFF'S
MOTION FOR CLERK'S ENTRY OF DEFAULT** on the interested parties in this
8 action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa,
9 addressed as follows:

10 Chad McKinney Pro Se 6266 Madeline Street, Apt. #61 San Diego, CA 92115	11 Plaintiff 12 Tel: 619-634-3566
13 United States District Court Attention: Hon. Judge William Q. Hayes 940 Front Street San Diego, CA 92101	14

15 BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air
16 courier, with next day service, to the offices of the addressees. (C.C.P. §
17 1013(c)(d)).18 I declare under penalty of perjury under the laws of the State of California that the
19 above is true and correct.

20 Executed on March 14, 2008, at Costa Mesa, California.

21
22 
23 _____
24 Rudi L. Wilson